Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 717/2015*, **

Communication submitted by:	A.Sh. et al. (represented by counsel, Angela Stettler)
Alleged victims:	The complainants
State party:	Switzerland
Date of complaint:	25 November 2015 (initial submission)
Date of present decision:	4 May 2018
Subject matter:	Deportation to the Russian Federation
Procedural issue:	Non-exhaustion of domestic remedies
Substantive issue:	Risk of torture upon return to country of origin; non-refoulement
Article of the Convention:	3

1.1 The complainants are A.Sh. and his wife Z.H., born in 1970 and 1974 respectively. The complaint is also submitted on behalf of their children, Ah.Sh., Ash.Sh. and A.M.Sh., born in 2003, 2004 and 2011 respectively. The complainants are ethnic Chechens of the Muslim faith who hold citizenship of the Russian Federation. At the time of the submission of their complaint, they were residing in Switzerland and awaiting their deportation to the Russian Federation, following the rejection of their asylum applications. They claim that their return to the Russian Federation would constitute a violation by Switzerland of article 3 of the Convention. The complainants are represented by counsel.

1.2 On 30 November 2015, in application of rule 114 (1) of its rules of procedure (CAT/C/3/Rev.6), the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party to refrain from returning the complainants to the Russian Federation while their complaint was being considered by the Committee. On 7 December 2015, the State party informed the Committee that it had acceded to that request. On 8 July 2016, the Committee, acting through the same Rapporteur, denied the State party's request of 21 January 2016 to examine the admissibility of the complaint separately from its merits and to lift the interim measures.

* Adopted by the Committee at its sixty-third session (23 April–18 May 2018).

** The following members of the Committee participated in the consideration of the communication: Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Diego Rodriguez-Pinzón and Honghong Zhang. Pursuant to rule 109, read in conjunction with rule 15, of the Committee's rules of procedure, and paragraph 10 of the guidelines on the independence and impartiality of members of the human rights treaty bodies (the Addis Ababa guidelines), Bakhtiyar Tuzmukhamedov did not participate in the consideration of the communication.

The facts as submitted by the complainants

2.1 In 1994, A.Sh. fought against the army of the Russian Federation during its first military campaign in the Chechen Republic (Chechnya). On 3 December 2000, that is to say, after the second military campaign, he and a group of other men from his neighbourhood were stopped by Russian soldiers and taken to an open field where they were requested to disclose the names of the Chechen insurgents in their neighbourhood. When each one of them replied in turn that they did not know of any insurgents, the soldier who questioned A.Sh. fired a shot at him, hitting him in the abdomen. A.Sh. indicates that he was taken to clinical hospital No. 9 in Grozny and provides a medical report to that effect.[1]

2.2 In September 2009, the brother-in-law of A.Sh. joined a group of Chechen insurgents and went into hiding after becoming a leader of that group. Thereafter, A.Sh. financially supported his sister's family. In 2010, the brother-in-law asked him to buy medicines for the insurgents. Despite his initial reluctance, A.Sh. finally agreed. The medicines were picked up by the insurgents from his apartment in the nights of 3 to 4 July and 31 July to 1 August 2010.

2.3 In the evening of 2 August 2010, A.Sh. was arrested on his way home from work by three policemen who took him to the Oktyabrsky police station in Grozny. At the police station he was verbally humiliated, severely beaten and strangled until he almost fainted. The interrogators urged him to "tell them everything", otherwise they would beat him until he died and he would "disappear without trace".

2.4 A.Sh. admitted having collaborated with insurgents and was interrogated in depth about that collaboration. He was ordered to forward every message he would receive from the insurgents to the authorities, and was forced to sign the minutes of the interrogation and a declaration stating that he would collaborate with them. Afterwards, he was taken to an underground cell. The same night, and with the assistance of a relative, who was the deputy chief of the city police in Grozny, A.Sh. was released. On 4 August 2010, he was taken to outpatient clinic No. 5 in Grozny, where he was diagnosed with a subcutaneous hematoma and multiple bruises.[2]

2.5 A.Sh. stayed with relatives for about a month and a half, first in Chechnya and then in Ingushetia, before his departure from the Russian Federation. Around that time, insurgents carried out an attack in the village where Ramzan Kadyrov, the current president of Chechnya, lived. This attack led to brisk activity by the secret service. In this context, A.Sh. was searched for at home, at his parents' home and at his parents-in-law's home. He left the Russian Federation legally on 30 October 2010 with his elder son, Ah.Sh. They arrived in Switzerland on 3 November 2010.

2.6 Around 20 November 2010, the police came to the shop of A.Sh. in Grozny and enquired about his whereabouts. His wife responded that she did not know, and was then told to leave the shop, without being allowed to take her personal belongings, and was ordered to surrender the keys, so that the police could seal off the shop. Two days later, the police confiscated the car of A.Sh. A few days later, his wife went to the Zavodskoy District Administration in Grozny to request the reopening of the shop and was told that it would remain closed for as long as her husband was on the run, since the shop was owned by him. Her repeated visits to the Zavodskoy District Administration did not yield any results.

2.7 A few days later, in the evening, the police came to the complainants' apartment and searched it, without a warrant, while enquiring about the whereabouts of A.Sh. In addition, Z.H. was asked to hand over her passport. When she went to a bedroom to get it, the

[1] A.Sh. provides an undated medical certificate from clinical hospital No. 9 in Grozny (available in the Russian original and in German translation), according to which he was brought to the said medical facility on 3 December 2000 with a gunshot wound in the abdomen.

[2] A.Sh. provides a medical certificate dated 27 September 2010 from outpatient clinic No. 5 in Grozny (in the Russian original and in German translation), according to which he was diagnosed on 4 August 2010 with cerebral contusion, a subcutaneous hematoma, injury to the thoracic cage and multiple bruises on the body, the left arm and both legs.

commanding officer followed her. He started to choke her from behind, covered her mouth and nose with his hands and raped her.[3] The same night Z.H., and her son Ash.Sh., went to live with her mother and brother. She indicates that, after that event, Ash.Sh. stopped speaking for a few days and only communicated by nodding and shaking his head; he started to wet his bed and became afraid of the police.

2.8 Z.H. left the Russian Federation illegally by car in the night of 11 to 12 December 2010, together with Ash.Sh. They arrived in Switzerland on 13 December 2010.

2.9 After the complainants had left the Russian Federation, several summonses[4] from the investigative officer and Zavodskoy District Court in Grozny, addressed to the first complainant, were sent to his home address. In the summonses from the investigative officer dated 20 January 2011 and 16 February 2011, A.Sh. was called to appear as a witness, on 24 January 2011 and 18 February 2011 respectively, at the Grozny Investigation Department of the Investigative Committee of the Russian Federation. The summonses from Zavodskoy District Court were dated 2 August 2011, 12 September 2011 and 17 October 2011. A.Sh. was called as a witness in a trial pursuant to article 208 of the Criminal Code (organization of an illegal armed formation, or participation in it), with the court hearings taking place on 8 August 2011, 23 September 2011 and 21 October 2011 respectively. The summonses were received by his father.

2.10 The brother of A.Sh. thereafter mandated a lawyer to enquire about the status of the proceedings mentioned in the summonses. On 28 November 2012, the Department of the Ministry of Internal Affairs in Chechnya[5] informed the lawyer that a criminal case had been opened against A.Sh. pursuant to articles 314 (evading serving a sentence of deprivation of liberty), 308 (refusal of a witness or a victim to give testimony) and 208 (organization of an illegal armed formation, or participation in it) of the Criminal Code and that A.Sh. had not participated in several court hearings. In the same letter, the lawyer was asked to disclose the whereabouts of A.Sh.

2.11 On 23 January 2013, the cousin of A.Sh. was sentenced to three years' imprisonment by the Supreme Court of Chechnya because of his alleged financial support for Chechen insurgents.[6] On 10 January 2015, the brother of A.Sh. was dismissed from his duties as a police officer and detective of the criminal investigation department, allegedly pursuant to an ordinary procedure.[7] The complainants believe that the dismissal was an act of reprisal.

2.12 The complainants sought asylum in Switzerland — A.Sh. on 3 November 2010 and Z.H. on 14 December 2010. A.Sh. had a screening interview on 10 November 2010 with the Federal Office for Migration.[8] Z.H. had a screening interview on 20 December 2010. Both had their substantive interviews on 9 March 2011.

2.13 On 29 December 2011, the Federal Office for Migration rejected the complainants' asylum applications. It considered that the "disadvantages" alleged by the complainants "were limited locally or regionally" to Chechnya and that therefore they had an internal flight alternative in the Russian Federation. The Federal Office for Migration took into account the fact that A.Sh. had been able to live in Ingushetia for two months prior to his departure from the Russian Federation without any problems with the federal-level authorities and also that he had been able to leave the Russian Federation on his own

[3] The complainants provide an account of this episode, given by Z.H. to her therapist (available in German). According to the information available on file, Z.H. was transferred to the University Clinic for Psychiatry and Psychotherapy in Bern by her general practitioner on 9 August 2012, due to suicidal ideation and psychological stress. She had never spoken to anyone before about the rape she had suffered, as she did not want her husband to know about it. In her view, and in accordance with her cultural background, the rape brought dishonour on herself and her husband, and she feared that her husband would kill himself out of shame.

[4] Copies are available on file in the Russian original and in German translation.

[5] A copy is available on file in the Russian original and in German translation.

[6] A copy of the judgment is available on file in the Russian original and in German translation.

[7] A copy of the dismissal order is available on file in the Russian original and in German translation.

[8] Known as the State Secretariat for Migration as of 1 January 2015.

passport.[9] It noted A.Sh.'s own assertions that he was not searched for by the police and that he never had problems with the federal-level authorities. The Federal Office for Migration stressed that A.Sh. and Z.H. had an above-average level of education and relevant work experience that would allow them to provide for their family's needs and build a new life in the Russian Federation. Finally, the Federal Office for Migration emphasized that a large part of the Chechen population traditionally lived outside of Chechnya. The earlier system of authorized residence (*propiska*) had been abolished in 1993. The authorities of the Russian Federation only take note of a citizen's decision to settle down in a certain area. Although some areas try to prevent uncontrolled settlement by adopting restrictive administrative measures, such measures have been revoked by the Constitutional Court of the Russian Federation as anti-constitutional.

2.14 On 2 February 2012, the complainants appealed against the Federal Office for Migration decision, to the Federal Administrative Court. They argued that the question of an internal flight alternative was only relevant once a well-founded fear of persecution had been established. A.Sh. clarified that, contrary to his initial testimony, a gunshot wound had been inflicted on him by an officer of the army of the Russian Federation during an identity check operation on 3 December 2000, and not during the first military campaign of the army of the Russian Federation in Chechnya. The complainants also submitted copies of the summonses (see para. 2.9 above) and the translations of them into German. They used this opportunity to inform the Federal Administrative Court about the birth of their third child, A.M.Sh., in Switzerland on 23 December 2011. In its interim decision dated 21 February 2012, the Court stated that the appeal was devoid of any prospects of success. On 28 February 2012, the complainants submitted copies of medical certificates and the translations of them into German.

2.15 On 24 May 2012, the Federal Administrative Court dismissed the appeal. It considered that A.Sh. had lied to the Swiss authorities, as he initially stated that his gunshot wound had been received during the first military campaign of the army of the Russian Federation in Chechnya but later claimed that it had been inflicted by a Russian soldier during a search operation in 2000. The Court did not accept the argument of A.Sh. that he did not initially tell the truth about the origins of his gunshot wound out of fear of being considered a Chechen insurgent by the Swiss authorities. In that context, the Court noted that, in any event, the alleged incident had taken place more than 10 years before he had left the Russian Federation and that it was therefore unrelated to his departure. The Court confirmed the decision of the Federal Office for Migration that an internal flight alternative existed under certain conditions for Russian Federation citizens of Chechen ethnicity. That is to say, asylum seekers of Chechen ethnicity do not fear collective persecution on the territory of the Russian Federation, except when they cannot receive effective protection from the authorities in the alternative place of residence because they are persecuted by the federal-level authorities. In the present case, the Court considered that the complainants, who feared persecution by the Chechen authorities, could approach the Russian Federation authorities for effective protection. The Court specifically noted in that context that A.Sh. did not have any problems with the federal-level authorities of the Russian Federation and could therefore count on their protection. Consequently, the Court stated that the Federal Office for Migration could dispense with the requirement of determining whether or not there existed a well-founded fear of persecution prior to deciding on the availability of the internal flight alternative in the present case. Lastly, the Court questioned the complainants' credibility, since they had adapted their account of the facts during the course of the asylum procedure, and had failed to submit evidence concerning the alleged closure of their shop, confiscation of the car, interrogation of A.Sh., existence of the declaration stating that A.Sh. would collaborate with the authorities, and so on. The Court was not convinced by the explanations provided by the complainants in that regard, since the uncle of A.Sh. was a high-ranking police officer in Grozny, who should have had access to the aforementioned evidence and could have forwarded it to the complainants. The Court also considered that, since the summonses did not involve criminal proceedings against A.Sh. but served only as

[9] Reference is made to the transcripts of A.Sh.'s screening interview of 10 November 2010 (at p. 6) and of his substantive interview of 20 December 2010 (at p. 15).

a request for him to testify as a witness, they were not relevant to the complainants' asylum application.

2.16 On 6 May 2013, the complainants filed an application with the Federal Office for Migration for a review, on the basis of new medical reports attesting that A.Sh., Z.H. and their son Ash.Sh. suffered from post-traumatic stress disorder, and of Z.H.'s account of rape. In particular, the complainants provided a number of medical reports from the University Clinic for Psychiatry and Psychotherapy in Bern (dated 31 August 2012, 23 January 2013, 11 April 2013 and 19 March 2013), stating that Z.H. suffered from post-traumatic stress disorder as a result of rape. They argued, inter alia and with reference to information from the International Committee of the Red Cross protection department in Grozny dated 31 January 2013, that there were no hospitals in Chechnya that could offer treatment for post-traumatic stress disorder. Therefore, medical obstacles rendered the enforcement of their removal order unreasonable. On 6 February 2014, the Federal Office for Migration rejected the complainants' application for a review, as it considered that Z.H. had had many opportunities during her asylum procedure to mention other possible grounds for seeking asylum and she had not done so. Furthermore, the Federal Office for Migration noted that the complainants only mentioned their psychological problems after the final judgment by the Federal Administrative Court and in view of their expulsion. The Federal Office for Migration also concluded that treatment for post-traumatic stress disorder for the complainants pursuant to the medical reports submitted by them was available in their country of origin, and that therefore they were not dependent on such treatment in Switzerland.

2.17 On 11 March 2014, the complainants appealed against the second negative decision by the Federal Office for Migration, to the Federal Administrative Court. In an interim decision dated 17 March 2014, the Federal Administrative Court suspended the enforcement of the expulsion order. On 28 September 2015, the Federal Administrative Court dismissed the complainants' appeal, as it considered that their psychological problems were insufficient to apply the non-refoulement principle, as there was no obligation on States to stop the enforcement of a removal order when the person concerned had suicidal ideation. If necessary, adequate measures could be taken to avoid suicidal tendencies during the removal process. Furthermore, the complainants could obtain treatment for post-traumatic stress disorder in the Russian Federation because the internal flight alternative would be available to them.

The complaint

3.1 The complainants claim that, if returned to the Russian Federation, they would be exposed to torture. Therefore, Switzerland would be in violation of article 3 of the Convention, in particular the non-refoulement obligation. They have provided sufficient evidence to support their claims, including medical reports confirming that A.Sh. was subjected to torture during his interrogation at the Oktyabrsky police station on 2 August 2010. The fact that he did not correctly explain in his initial testimony the origins of his gunshot wound was justified by his fear of being considered a Chechen insurgent by the Swiss authorities. The approach taken by the Federal Administrative Court was perfunctory, as it dismissed the copies of the summonses as ineligible evidence (see para. 2.15 above) but expected the complainants instead to make available, with the help of A.Sh.'s uncle, evidence from the Chechen authorities of the unlawful closure of his shop, the confiscation of the car and the search of their apartment without a warrant. The uncle would be putting himself in danger and drawing the attention of the other police officers to himself if he tried to obtain such evidence. The summonses issued in A.Sh.'s name served the sole purpose of ensuring that he appeared before the authorities.

3.2 As regards the allegations by Z.H. of rape, the complainants recall the Committee's jurisprudence[10] according to which rape constitutes the infliction of severe pain and suffering perpetrated for a number of impermissible purposes and thus amounts to torture. They consider that the State party's authorities applied a very high standard of proof in this regard and refer to several decisions of the Committee in which it considered that the delay

[10] Reference is made to *V.L. v. Switzerland* (CAT/C/37/D/262/2005), para. 8.10.

in reporting sexual abuse did not undermine the complainant's credibility.[11] The Federal Office for Migration based its decision only on the fact that Z.H. did not mention the rape during the first asylum procedure, even though it was explained in the submitted medical reports that avoidance of traumatic memories was one of the main symptoms of post-traumatic stress disorder. Furthermore, the Federal Administrative Court did not examine the credibility of Z.H.'s rape allegations.

3.3 As a result of the traumatizing events that happened to them and their family members in Chechnya, the complainants suffer from post-traumatic stress disorder and major depressive disorder, which includes suicidal thoughts, and they are receiving psychiatric and psychological therapy in Switzerland. Their son Ash.Sh. has also been diagnosed with post-traumatic stress disorder and with enuresis unrelated to any substance or known physiological condition and receives psychological treatment.

3.4 With regard to the internal flight alternative, the complainants argue that it is not available to them, as they were ill-treated and persecuted by "public officials or other persons acting in official capacities in the North Caucasus". Therefore, they fear State-run persecution. They refer to the 2003 paper by the Office of the United Nations High Commissioner for Refugees according to which internal relocation to other parts of the Russian Federation cannot be a relevant consideration where the feared agent of persecution is a State agent.[12] The guidelines on the treatment of Chechen internally displaced persons, asylum seekers and refugees in Europe, of the European Council on Refugees and Exiles, revised in 2007, stated that for Chechens in need of international protection, a viable internal protection alternative is not available.[13] With reference to the European Court of Human Rights judgment in *I v. Sweden*[14] and to the European Council on Refugees and Exiles guidelines updated in March 2011,[15] the complainants submit that ethnic Chechens returning from overseas are called to meetings with the Federal Security Service and the Ministry of Internal Affairs, where they are questioned, often with threats and ill-treatment and demands for payment. Young men, especially, are made to collaborate with the security services. These entities operate in the entire territory of the Russian Federation. Therefore, there is no internal flight alternative for refugees from the North Caucasus, since they can be questioned and forced to collaborate with the regime throughout the Russian Federation. Even if the Chechen authorities cannot directly exercise power outside Chechnya, they collaborate with the Russian Federation authorities, and the latter obtain information from the Chechen authorities about persons suspected of being insurgents. Therefore, it is obvious to the complainants that the Russian Federation authorities will not protect them — persons of Chechen ethnicity accused by the Chechen authorities of collaboration with the insurgents — as they act against the interests of the Government of the Russian Federation. Consequently, the complainants run a real risk of being interrogated, tortured and then transferred to Chechnya by the Russian Federation authorities.

3.5 The complainants also submit that the North Caucasus region has been a centre of political and civil conflict for quite some time, and that the Russian Federation security forces respond to the instability with harsh actions, including extralegal sanctions and increased monitoring that can lead to house searches, arrests, torture and killings. In that context, the complainants quote the Committee's concluding observations of 2012 on the Russian Federation,[16] according to which there is a widespread practice of torture and ill-treatment as a means to extract confessions, and the authorities fail to carry out prompt, effective and independent investigations into allegations of torture and ill-treatment by officials. They also refer to the Committee's recent decision in a complaint involving an

[11] Reference is made to *V.L. v. Switzerland*, para. 8.8; *Alan v. Switzerland* (CAT/C/16/D/21/1995), para. 11.3; and *I.A.O. v. Sweden* (CAT/C/20/D/65/1997), para. 14.3.

[12] "UNHCR paper on asylum seekers from the Russian Federation in the context of the situation in Chechnya", para. 76, available at www.refworld.org/docid/3ea7bbd34.html.

[13] Available at www.refworld.org/docid/4603bb602.html.

[14] Application No. 61204/09, judgment of 5 September 2013, para. 39.

[15] Available at www.ecre.org/wp-content/uploads/2016/07/ECRE-Revised-Guidelines-on-the-treatment-of-Chechen-IDPs-asylum-seekers-and-refugees-in-Europe_March-2011.pdf, pp. 52–53.

[16] CAT/C/RUS/CO/5.

extradition to the Russian Federation, in which the Committee concluded that the pattern of gross, flagrant or mass violations of human rights and the significant risk of torture or other cruel, inhuman or degrading treatment in the North Caucasus region of the Russian Federation had been sufficiently established.[17] The complainants also quote reports by several non-governmental organizations, according to which law enforcement and security agencies in the North Caucasus region continue to punish relatives and suspected supporters of alleged insurgents.[18] It is stated in those reports that family members of Chechen resistance activists run the risk of being tortured, kidnapped or even extrajudicially killed by Russian Federation security authorities.[19]

State party's observations on admissibility

4.1 On 21 January 2016, the State party challenged the admissibility of the complaint. The State party recalls that the complainants, in their complaint to the Committee, submitted that: (a) the Russian Federation authorities initiated criminal proceedings against the first complainant; (b) on 23 January 2013, the Supreme Court of Chechnya sentenced the cousin of A.Sh. to three years' imprisonment; and (c) the brother of A.Sh. was dismissed from his duties as a police officer on 10 January 2015. These elements were not raised with the authorities of the State party during the review procedure.[20] The complainants also failed to submit any evidence to the authorities of the State party in support of these elements. The State party should have had an opportunity to evaluate the new evidence before the complaint was submitted to the Committee. In the context of the review procedure, the complainants essentially limited themselves to asserting health problems, the absence of medical facilities in the Russian Federation, and the well-being of their children, who would be uprooted in the event of their return. The State party maintains that A.Sh. and his three children could have lodged a second asylum application on the basis of the new evidence that became available after the closure of their first asylum procedure. The opening of a new asylum procedure following a second asylum application entails the right to stay in Switzerland until the procedure is complete. As regards extraordinary remedies for the submission of new facts, neither the Federal Office for Migration (in an application for a review) nor the Federal Administrative Court (in a request for a review) can grant measures with suspensive effect. In all cases, a decision to suspend the enforcement of the expulsion order, or a decision to classify an appeal as a new asylum application, is taken after an individual examination of the case, which includes a risk assessment pursuant to article 3 of the Convention.

4.2 The State party concludes, therefore, that A.Sh. and his three children have not exhausted domestic remedies, as they have not availed themselves of effective means to present new claims and evidence to the Federal Office for Migration, whose negative decision could have also been appealed to the Federal Administrative Court.

Complainants' comments on the State party's observations on admissibility

5.1 In their submission of 18 March 2016, the complainants argue that A.Sh. referred, in his appeal to the Federal Administrative Court of 2 February 2012, to the summonses issued in his name by the Chechen authorities. On 14 February 2012, the complainants' counsel submitted copies of the summonses, together with a translation of them into German (see para. 2.14 above). However, in its interim decision of 21 February 2012, the Federal Administrative Court stated that A.Sh. had been summoned as a witness and not as a defendant, and that the summonses "would not be appropriate" to rebut the assumption that there existed an internal flight alternative for the complainants in the Russian Federation. The complainants' counsel requested a new hearing concerning the new facts but the Federal Administrative Court rejected that request on 24 May 2012 and reiterated its

[17] See *X v. Kazakhstan* (CAT/C/55/D/554/2013), para. 12.6.

[18] Human Rights Watch, *World Report 2013: Russia* (31 January 2013).

[19] Swiss Refugee Council, "Tschetschenien: Verfolgung von Personen mit Kontakten zu den Mudschahed" (22 April 2013), pp. 4–8.

[20] Reference is made to the complainants' application for a review, submitted to the Federal Office for Migration on 6 May 2013, and to their appeal to the Federal Administrative Court of 11 March 2014 and the Court's decision thereon, of 28 September 2015.

earlier statement that the summonses did not concern A.Sh.'s own person and were therefore irrelevant to the complainants' asylum application. With reference to the above-mentioned decisions by the Federal Administrative Court, the complainants submit that the competent authorities of the State party had ample opportunity to examine A.Sh.'s assertion — together with the supporting evidence — that criminal proceedings had been instituted against him by authorities in Chechnya.

5.2 Contrary to what is suggested by the State party, the complainants could not lodge a new asylum application on the basis of the summonses, since such an application could only be initiated if a complainant was able to assert new asylum grounds.[21] As the summonses had already been examined by the Federal Administrative Court, the complainants' assertion about the opening of the criminal proceedings against A.Sh. did not constitute a new fact. The complainants argue, therefore, that they had exhausted all domestic remedies with regard to the institution of criminal proceedings against A.Sh.

5.3 The complainants acknowledge that they did not mention either in the course of their asylum procedure or the review procedure that on 23 January 2013 the Supreme Court of Chechnya sentenced the cousin of A.Sh. to three years' imprisonment and that the brother of A.Sh. was dismissed from his duties as a police officer on 10 January 2015. At the time they submitted their application for a review, on 6 May 2013, they were unaware of those facts. As to the State party's argument that they could have lodged a second asylum application on the basis of the new evidence, the complainants submit that a new asylum application is an extraordinary remedy and that they had already explained their grounds for claiming asylum in their first procedure and the subsequent review procedure. The new facts referred to by the State party concern the complainants' family members and simply constitute further evidence corroborating the complainants' fear of torture and persecution, which the competent authorities of the State party had already examined on the substance of the case. A new asylum application would not be an effective domestic remedy in their case, as it would only allow the competent authorities of the State party to examine the new facts in isolation from the rest of their case, with the earlier decisions of the State party's authorities automatically being accepted as accurate. The complainants submit, in this context, that the Federal Office for Migration and Federal Administrative Court decisions in their case were flawed. Therefore, they would have to apply for a qualified review pursuant to article 111 (c) of the Asylum Act.[22] Neither such an application, nor the subsequent appeal against the Federal Office for Migration decision, however, would have suspensive effect.[23] Hence, it does not constitute an effective remedy. The complainants add that, in any case, they cannot file an application for a review or a new asylum application on the basis of the conviction of A.Sh.'s cousin and the dismissal of his brother in Chechnya.

5.4 The complainants recall that the new facts concern events in Chechnya and are, therefore, inappropriate to rebut the assumption about the availability of the internal flight alternative. They argue that even if they had filed a second asylum application, the Federal Office for Migration would have dismissed it pursuant to article 111 (c) (2) of the Asylum Act.[24] Finally, the complainants submit that if the authorities of the State party considered that the new facts were relevant, they had the possibility of reviewing the complainants' asylum application under article 111 (b) of the Asylum Act, after they had been informed of the present complaint to the Committee, which they did not do.[25] Therefore, there are no effective domestic remedies available to the complainants with regard to the new facts identified by the State party.

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[21] Reference is made to the decision of the former Asylum Appeal Commission: EMAR 2006/20, consideration 2.3.

[22] Reference is made to Federal Administrative Court judgment 2014/39 of 16 December 2014, para. 4.5.

[23] Article 111 (b) (3) of the Asylum Act reads as follows: "The submission of an application for review does not delay enforcement. The authority responsible for processing may suspend enforcement on request if there is a specific danger to the applicant in his or her native country or country of origin."

[24] Article 111 (b) (2) of the Asylum Act reads as follows: "Multiple applications or repeated applications that state the same grounds shall be dismissed without a formal decision being taken."

[25] Article 111 (b) (4) of the Asylum Act reads as follows: "Applications for review without a statement of grounds, or repeated applications that state the same grounds, shall be dismissed without a formal decision being taken."

State party's observations on the merits

6.1 On 27 June 2016, the State party submitted its observations on the merits. It recalled its challenge to the admissibility of the complaint with regard to A.Sh. and his three children for non-exhaustion of domestic remedies (see paras. 4.1 and 4.2 above), and submitted that, since its national authorities had not been in a position to express their opinion on the new elements referred to by the complainants, it would limit its observations to the aspects that had been the subject of the domestic proceedings.

6.2 The State party acknowledges that the human rights situation in Chechnya is of concern in many respects. However, this situation does not, as such, constitute sufficient grounds for determining that the complainants are at risk of being subjected to torture upon return to the Russian Federation.[26] The complainants have failed to demonstrate that they run a personal, present and substantial risk of torture if returned.

6.3 Referring to the Committee's general comment No. 1 (1997) on the implementation of article 3 in the context of article 22, the State party recalls that the torture or ill-treatment that the complainants have experienced in the past is one of the elements to be taken into account when considering whether they would risk being tortured if returned to their country of origin. In this regard, the State party relies on the conclusion reached by its national authorities that "measures of persecution" alleged by the complainants "were limited locally or regionally" (see para. 2.13 above). The State party adds that, in accordance with the practice of its national authorities, under the principle of subsidiarity, asylum or provisional admission is granted only if there is no flight alternative for the persons concerned within their own country. As far as ethnic Chechens are concerned, the possibility of settling elsewhere in the Russian Federation is subject to certain conditions, and follows a review of each particular case. In particular, the person must have a network, such as family, at the new place of residence, that initially could assist with accommodation. Sufficient financial resources could facilitate one's settlement in a new place. Other factors that should be taken into account include the age, state of health, sex, education and professional experience of the person concerned.[27] The State party refers to the Committee's recent decision in which the return of an ethnic Chechen to the Russian Federation did not constitute a violation of the Convention.[28]

6.4 In conformity with the above-mentioned practice, the authorities of the State party considered that the complainants could settle in the Russian Federation elsewhere than in Chechnya (see para. 2.13 above). In that context, A.Sh. mentioned to the authorities of the State party that he had friends in Moscow who had invited him to jointly open a company in Tver trading in grain crops. According to A.Sh., that activity would allow him to provide for the family's needs.[29] His wife stated that she had an aunt and a cousin in Moscow, both of whom she was in regular contact with.[30] Therefore, the complainants have a personal network and family that could support them initially and assist with their accommodation. Both are relatively young and have a very good education and relevant work experience.[31] They jointly ran a shop selling men's clothes and video equipment.

6.5 The registration of persons originating from Chechnya in another region has been greatly simplified in recent years, since the persons concerned are only required to register in their new place of residence, which they can also do on the Internet.[32]

6.6 The State party also submits that, contrary to what is being claimed by the complainants, there is reason to believe that the Chechen authorities are not in a position to exercise their power outside of Chechnya and thus cannot persecute persons in the rest of

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[26] See *A.B. v. Sweden* (CAT/C/54/D/539/2013), paras. 7.3 and 7.6.

[27] Reference is made to the decision of the former Asylum Appeal Commission of 14 June 2005 in T.V., JICRA 2005/17, consideration 8.3.2; and to *Alan v. Switzerland*, para. 11.4.

[28] Reference is made to *A.B. v. Sweden*.

[29] Reference is made to the transcript of A.Sh.'s substantive interview of 20 December 2010 (at p. 14).

[30] Reference is made to the transcript of Z.H.'s substantive interview of 9 March 2011 (at p. 3).

[31] A.Sh. has a degree in engineering and worked as a head of the technical planning division of a State design institute. Z.H. is a qualified geographer and accountant, who worked as a schoolteacher.

[32] Reference is made to the Federal Administrative Court judgment dated 28 September 2015 concerning A.Sh. and his three children (para. 4.4.4).

the Russian Federation. If, however, the Chechen authorities were to do so, the complainants could turn to the Russian Federation authorities, which the State party believes would offer them protection. Indeed, it is unlikely that the Russian Federation authorities would allow the Chechen authorities to persecute persons outside of the territory controlled by them. In addition, the complainants confirmed that they had no difficulties with the federal-level authorities of the Russian Federation. There is also nothing to indicate that the complainants may be exposed to reprisals by Chechen insurgents outside of Chechnya. It should also be pointed out that any discrimination against the complainants because of their Chechen origin does not constitute treatment contrary to the Convention.

6.7 Since the complainants have the possibility of settling in another region of the Russian Federation, the ill-treatment suffered by them does not suggest, in the present case, that they would be exposed to a serious risk of treatment contrary to the Convention in case of return. In the light of this possibility of internal flight, the authorities of the State party did not examine in detail the credibility of the complainants' allegations. However, they expressed doubts about it. They noted, inter alia, that A.Sh. had submitted two different versions of the events related to the origins of his gunshot wound (see paras. 2.14 and 2.15 above). The complainants also failed to submit evidence concerning the alleged closure of their shop, confiscation of the car, interrogation of A.Sh. or existence of the declaration stating that A.Sh. would collaborate with the authorities (see para. 2.15 above). The State party submits, in this context, that an allegation is insufficiently substantiated when, on an essential point, the precise and circumstantial details are lacking, which proves that the complainants have not experienced the events described. Likewise, an allegation is implausible when, on an essential point, it is contrary to logic or general experience.

6.8 Another element to be taken into account in assessing the risk of the complainants being subjected to torture upon return to the Russian Federation is whether they have engaged in political activities, either within or outside their country of origin. On that matter, the State party submits that the complainants do not claim to have engaged in any political activities in their country or in Switzerland.

6.9 The State party submits, with regard to the state of health of A.Sh., Z.H. and their son Ash.Sh., that it is not of a nature that would expose them to treatment amounting to torture in the case of their return to the Russian Federation.[33] The State party recalls, in that connection, the complainants' possibility of settling in another region of the Russian Federation, in particular in the Moscow region. This region has medical infrastructure appropriate for their treatment, and appropriate medication could, if necessary, be provided.[34]

6.10 The State party also notes that, although this aspect is not directly determinative under the Convention, its national authorities also examined in a detailed manner the complainants' removal in the light of the principle of the best interests of the child.[35]

6.11 In the light of the above-mentioned considerations, the State party concludes that there is nothing to indicate that there are serious grounds to fear that the complainants would be seriously and personally exposed to torture upon their return to the Russian Federation.

Complainants' comments on the State party's observations on the merits

7.1 In their submissions of 8 September 2016, the complainants submit that the personal, real and present risk of torture results from the individual and cumulative effect of the following factors: (a) their family connections with Chechen insurgents; (b) the provision of support to the insurgents by A.Sh.; and (c) the fact that A.Sh. and Z.H. have already come to the attention of the authorities and have been subjected to torture in the past. In this context, the complainants note that the State party did not dispute that they had been tortured in the past. It argued, however, that that persecution had been limited to the local or regional level, that is to say, the complainants had been searched for only by the Chechen

[33] Ibid. (para. 4.3.3).
[34] Ibid. (para. 4.4.6).
[35] Ibid. (para. 4.4.5).

authorities and not by the Russian Federation authorities. The complainants recall, however, that they submitted evidence proving that a criminal case had been opened against A.Sh. pursuant to articles 314 (evading serving a sentence of deprivation of liberty), 308 (refusal of a witness or a victim to give testimony) and 208 (organization of an illegal armed formation, or participation in it) of the Criminal Code. Therefore, the authorities are still looking for him and there is a real, personal and present risk that he will again be subjected to torture during interrogation or detention.

7.2 The State party's authorities did not thoroughly evaluate the complainants' allegations at the domestic level or find that they lacked credibility. Rather, the State party's authorities dispensed with such an evaluation after having concluded that there was an internal flight alternative available to them. No "safe" area exists for the complainants in Chechnya or the Russian Federation, since the police are looking for A.Sh. and a criminal case has been opened against him.

7.3 The complainants reiterate their arguments with regard to the cooperation between the Chechen authorities and the Russian Federation authorities (see para. 3.4 above). They add that the Russian Federation authorities installed a pro-Russian Chechen regime and that the President of the Russian Federation himself has vowed to take tougher action against Chechen insurgents, who are considered as "domestic terrorists".[36] Therefore, there is no internal flight alternative for refugees from the North Caucasus, such as the complainants, since they can be questioned and arrested throughout the Russian Federation.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

8.2 The Committee notes that the State party contested the admissibility of the complaint with regard to A.Sh. and his three children on the grounds of non-exhaustion of domestic remedies. The State party argued, in particular, that the competent national authorities did not have the opportunity to evaluate the following new elements that had been presented by the complainants in their complaint to the Committee: (a) the opening of the criminal case against A.Sh. by the authorities of the Russian Federation; (b) the alleged sentencing of the cousin of A.Sh. to three years' imprisonment by the Supreme Court of Chechnya in January 2013; and (c) the reported dismissal of the brother of A.Sh. from his duty as a police officer in January 2015. The Committee also notes the State party's assertion that the complainants in question could have lodged a second asylum application on the basis of the new evidence that became available after the closure of their first asylum procedure.

8.3 In this context, the Committee notes the complainants' acknowledgment that they did not mention either in the course of their asylum procedure or the review procedure the sentencing and dismissal of A.Sh.'s family members in Chechnya (see para. 5.3 above). The Committee also notes the complainants' assertion that the new elements constitute further evidence corroborating the complainants' fear of torture and persecution, which the competent national authorities have already examined the substance of the case, rather than "new asylum grounds". Therefore, even if they had lodged a second asylum application, the Federal Office for Migration would have dismissed it pursuant to article 111 (c) (2) of the Asylum Act, as a "multiple or repeated application". Furthermore, the new elements concern events in Chechnya and are, therefore, inappropriate to rebut the assumption of the authorities of the State party about the availability of an internal flight alternative for the complainants in the Russian Federation. The Committee notes in this connection that the

[36] Reference is made to Andrew E. Kramer, "Russia shows what happens when terrorists' families are targeted", *New York Times*, 29 March 2016.

State party does not contest the complainants' detailed arguments concerning the lack of effectiveness of the second asylum application in the particular circumstances of their case.

8.4 Furthermore, the Committee considers that the complainants' claims before the Committee are based on a set of facts which were examined by the State party's authorities and which have been sufficiently substantiated for the purposes of admissibility. The Committee notes in this respect that the State party does not challenge the admissibility of the complaint on any other grounds, and it therefore finds no obstacles to the admissibility.

8.5 Accordingly, the Committee declares the complaint admissible with regard to the facts and claims brought before the State party's authorities and proceeds with its consideration of the merits.

Consideration of the merits

9.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 22 (4) of the Convention.

9.2 In the present case, the issue before the Committee is whether the return of the complainants to the Russian Federation would constitute a violation of the State party's obligation under article 3 (1) of the Convention not to expel or to return ("refouler") a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

9.3 The Committee must evaluate whether there are substantial grounds for believing that the complainants would be personally in danger of being subjected to torture upon return to the Russian Federation. In assessing that risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.[37]

9.4 The Committee recalls its general comment No. 4 (2017) on the implementation of article 3 in the context of article 22, according to which the non-refoulement obligation exists whenever there are "substantial grounds" for believing that the person concerned would be in danger of being subjected to torture in a State to which he or she is facing deportation, either as an individual or a member of a group which may be at risk of being tortured in the State of destination. The Committee's practice in this context has been to determine that "substantial grounds" exist whenever the risk of torture is "foreseeable, personal, present and real".[38] Indications of personal risk may include, but are not limited to: the complainant's ethnic background; previous torture; incommunicado detention or other form of arbitrary and illegal detention in the country of origin; clandestine escape from the country of origin for threats of torture; and violence against women, including rape.[39]

9.5 The Committee also recalls that the burden of proof is on the author of the complaint, who must present an arguable case — that is, must submit circumstantiated arguments showing that the danger of being subjected to torture is foreseeable, present, personal and real. However, when the complainant is in a situation where he or she cannot elaborate on his or her case, for instance when the complainant has demonstrated that he or she has no possibility of obtaining documentation relating to his or her allegation of torture or is deprived of his or her liberty, the burden of proof is reversed and it is up to the State party

[37] See *T.M. v. Republic of Korea* (CAT/C/53/D/519/2012), para. 9.3.

[38] See the Committee's general comment No. 4 (2017) on the implementation of article 3 in the context of article 22, para. 11.

[39] Ibid., para. 45.

concerned to investigate the allegations and verify the information on which the complaint is based.[40] The Committee further recalls that it gives considerable weight to findings of fact made by organs of the State party concerned, however it is not bound by such findings and will make a free assessment of the information available to it in accordance with article 22 (4) of the Convention, taking into account all the circumstances relevant to each case.[41]

9.6 In assessing the risk of torture for the purposes of the present complaint, the Committee notes A.Sh.'s claim that in August 2010 he was detained in Chechnya, interrogated about his collaboration with Chechen insurgents, tortured in detention, and forced to sign a declaration stating that he would collaborate with the authorities. The Committee also notes the complainants' claim that after A.Sh.'s release from detention and subsequent departure from the Russian Federation, he continued to be of interest to the authorities, since his shop was closed down, the car was confiscated, and apartments of his own family and of his parents and parents-in-law were searched. In November 2012, a criminal case against A.Sh. was opened pursuant to articles 314 (evading serving a sentence of deprivation of liberty), 308 (refusal of a witness or a victim to give testimony) and 208 (organization of an illegal armed formation, or participation in it) of the Criminal Code. The Committee further notes the complainants' claim that Z.H. was raped by a police officer in her apartment in Grozny during an unauthorized search operation aimed at establishing the whereabouts of her husband. The Committee notes that the complainants provided a medical certificate issued by the outpatient clinic in Grozny attesting to A.Sh.'s injuries received in August 2010, as well as the medical reports from the psychiatrist and psychologists in Switzerland confirming that A.Sh. and Z.H. suffered from post-traumatic stress disorder and major depressive disorder, and that their son, Ash.Sh., has also been diagnosed with post-traumatic stress disorder.

9.7 The Committee also notes the complainants' claim that the personal, present and real risk of torture upon their return to the Russian Federation results from the individual and cumulative effect of the following factors: (a) their family connections with members of Chechen insurgents; (b) provision of support to the insurgents by A.Sh.; and (c) the fact that A.Sh. and Z.H. have already come to the attention of the authorities and have been subjected to torture in the past. The State party did not dispute that they have been tortured in the past but, nevertheless, it has dispensed with the evaluation of the complainants' credibility and the establishment of a well-founded fear of persecution in case of their return to the Russian Federation on the basis of the national authorities' assumption that an internal flight alternative existed for them in their country of origin, an argument that the complainants have disputed. The complainants allege, inter alia, that ethnic Chechens returning from overseas are called to meetings with the State entities operating on the entire territory of the Russian Federation, such as the Federal Security Service and the Ministry of Internal Affairs, where they are questioned, often with threats, ill-treatment and demands for payment, and are often made to collaborate with the security services (see para. 3.5 above). The Committee also notes that the national authorities have expressed some doubts about the credibility of A.Sh.'s allegations and also questioned why Z.H. did not mention rape during the first asylum procedure. The Committee notes in this respect that, according to the medical reports issued by the Swiss psychiatrist and psychologists, A.Sh. and Z.H. suffer from post-traumatic stress disorder as a result of treatment to which they were subjected prior to their departure from the Russian Federation, and considers, therefore, that since complete accuracy is seldom to be expected from victims of torture,[42] the delay in reporting sexual abuse does not undermine the victim's credibility.[43] The Committee also recalls its jurisprudence, establishing that rape constitutes "infliction of severe pain and suffering perpetrated for a number of impermissible purposes, including interrogation, intimidation, punishment, retaliation, humiliation and discrimination based on gender", and that in other cases it has found that "sexual abuse by the police … constitutes torture" even when it is perpetrated outside of formal detention facilities.[44]

[40] Ibid., para. 38.

[41] Ibid., para. 50.

[42] Ibid., para. 42; and *Ke Chun Rong v. Australia* (CAT/C/49/D/416/2010), para. 7.5.

[43] See *Alan v. Switzerland*, para. 11.3.

[44] See *V.L. v. Switzerland*, para. 8.10.

9.8 The Committee notes that, as the State party's authorities based their decisions to reject the complainants' applications on the basis of the assumption that an internal flight alternative was available to them in the Russian Federation, the complainants' claims regarding risk based on their past experience in their country of origin and on real or perceived family connections and collaboration with the Chechen insurgents were not fully examined. The Committee recalls, in this context, that the internal flight or relocation alternative does not represent a reliable and durable alternative where the lack of protection is generalized and the individual concerned would be exposed to a further risk of persecution or serious harm. [45] In this context, the Committee notes that so-called registration, that is, the system that records the place of residence and internal migration of Russian nationals, still exists in the Russian Federation and is being rigorously enforced. Under article 5 of the Law on the Right of Nationals of the Russian Federation to Freedom of Movement and Choice of Place of Residence within the Russian Federation, Russian nationals must register with the relevant authorities within 90 days of arriving in a new place of residence. Living in a dwelling without having obtained permanent or temporary registration is considered an administrative offence pursuant to article 19.15.1 of the Code of the Russian Federation on Administrative Offences. The Committee also notes that, according to information in the public domain, the federal-level authorities of the Russian Federation closely cooperate with the Chechen authorities, particularly as far as the exchanging of information on persons suspected of being insurgents is concerned. It further notes that the current leadership of Chechnya enjoys support and protection from the Russian Federation authorities at the highest political level. Therefore, once the complainants are returned to the Russian Federation, they are legally bound to notify the Russian Federation authorities about their place of residence and such information is accessible to the Chechen authorities. The Committee therefore considers that, by rejecting the complainants' asylum applications on the basis of the assumption of availability of an internal flight alternative and without giving sufficient weight to whether they could be at risk of persecution, the State party failed in its obligations under article 3 of the Convention.

10. In the light of the foregoing, the Committee, acting under article 22 (7) of the Convention, concludes that the complainants' deportation to the Russian Federation would constitute a breach of article 3 of the Convention.

11. The Committee is of the view that, pursuant to article 3 of the Convention, the State party has an obligation to refrain from forcibly returning the complainants to the Russian Federation or to any other country where there is a real risk of them being expelled or returned to the Russian Federation. Pursuant to rule 118 (5) of its rules of procedure, the Committee invites the State party to inform it, within 90 days from the date of the transmittal of the present decision, of the steps it has taken to respond to the above observations.

[45] See *Mondal v. Sweden* (CAT/C/46/D/338/2008), para. 7.4; and *M.K.M. v. Australia* (CAT/C/60/D/681/2015), para. 8.9.